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Nos. 03-622 and 03-627

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In the Supreme Court of the United States

DAVID HENSON MCNAB, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the reference in the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, to "any foreign law" refers only to foreign statutes and not to foreign regulations.

2. Whether the court of appeals erred in disagreeing with the representations provided by the Embassy of the Republic of Honduras, as amicus curiae in that court, respecting the application of Honduran law, which differed from the earlier representations that Honduran officials provided to United States officials and to the district court.

3. Whether the Due Process Clause requires a court of appeals to give retroactive effect to a Honduran court's asserted invalidation of a Honduran law.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 331 F.3d 1228.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2003. A petition for rehearing was granted in part and denied in part on May 29, 2003 (Pet. App. 77a-

[1] Citations to the petition appendix refer to the separately bound appendix that accompanies the petition in No. 03-622.

78a). On August 8, 2003, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 26, 2003. On September 20, 2003, Justice Kennedy further extended the time within which to file a petition for a writ of certiorari to and including October 24, 2003, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371, and other federal offenses arising from violation of the Lacey Act Amendments of 1981 (the Lacey Act), 16 U.S.C. 3371 *et seq.* Petitioners McNab, Blandford, and Schoenwetter were sentenced to 97 months of imprisonment, while petitioner Huang was sentenced to 24 months of imprisonment. Pet. App. 8a-9a. The court of appeals affirmed. *Id.* at 2a-3a.

1. The Lacey Act prohibits persons from importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce any fish or wildlife that was taken, possessed, transported, or sold in violation of any underlying foreign law. 16 U.S.C. 3372(a)(2). The Act imposes criminal penalties on violators of this provision who knew or should have known that the fish or wildlife was unlawfully taken, possessed, transported, or sold. 16 U.S.C. 3373(d)(1) (knowing violation); 16 U.S.C. 3373(d)(2) (negligent violation). In addition, Section 545 of Title 18 of the United States Code provides criminal penalties for knowingly importing or dealing in merchandise brought into the United States contrary to law.

2. Petitioner David Henson McNab owned and operated a fleet of lobster fishing boats that harvested Caribbean spiny lobster in Honduran fishing waters. During the period covered by the indictment, the Republic of Honduras imposed conservation regulations to protect its lobster fishery from over-exploitation and health regulations to ensure safe processing of fishery products. Five sets of requirements respecting the harvesting and handling of spiny lobsters are relevant to this case: (1) Resolution 030-95 prohibited harvesting, processing, or selling any spiny lobster with a tail length shorter than 5½ inches; (2) Article 70(3) of the Fishing Law prohibited harvesting or selling egg-bearing lobsters; (3) Article 30 of the Fishing Law required lobster fishermen to dock their vessels and unload their catch in a Honduran port before exportation; (4) Articles 35 and 37 of the Fishing Law required fishing vessels to report their catch in writing to Honduran authorities; and (5) Agreement 0008-93 required that any lobster be inspected and processed in Honduras before exportation. See Pet. App. 51a, 57a-64a.[2]

In violation of those requirements, McNab's fleet harvested lobsters, including egg-bearing lobsters and lobsters with tails less than 5½ inches in length, packed frozen lobsters in bulk plastic bags, and loaded them directly from the lobster boats onto McNab's cargo transport vessel, the *Caribbean Clipper*. See Pet. App. 4a-5a. Some of the lobster tails were handled in compli-

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[2] Petitioner McNab asserts that only three of those requirements are relevant to petitioners' convictions, because the government did not properly charge a violation of the landing requirements in the indictment and the evidence was insufficient for the jury to have found that the reporting requirements were violated. 03-622 Pet. 4 n.2. The court of appeals summarily rejected those arguments. Pet. App. 34a.

ance with Honduran reporting, inspection, and processing requirements, but others were transported aboard the *Caribbean Clipper* in unprocessed bulk bags to Bayou la Batre, Alabama, for delivery to Seamerica Corporation, petitioner Robert Blandford's company. *Ibid.* Once the lobster tails were in the United States, Blandford and a colleague, Abner Schoenwetter, resold the shipments to the American Export Import Corporation, through petitioner Diane Huang, and to other United States companies. See *id.* at 114a-118a (second superseding indictment). The shipments at issue in this case involved approximately 400,000 pounds of spiny lobsters, with a value of approximately $4.6 million. See *id.* at 137a-144a.

On February 3, 1999, agents of the National Marine Fisheries Service (NMFS) received an anonymous facsimile indicating that McNab's *Caribbean Clipper* would arrive in Bayou la Batre on February 5, 1999, with a shipment of lobsters containing "undersized (3 & 4 oz) lobster tails, [which was] a violation of Honduran law." Pet. App. 4a. The facsimile further stated that Honduras prohibited the bulk exportation of lobsters and required that lobsters be packed in boxes for export. *Ibid.* NMFS agents, with the assistance of the United States Department of State, thereupon consulted with the Republic of Honduras—specifically, the Honduran Direccion General de Pesca y Acuicultura (DIGEPESCA), which is the agency within Honduras's Secretaria de Agricultura y Ganaderia (SAG) that is responsible for the enforcement of Honduras fishing laws—seeking information about the legality of the lobster shipment referenced in the facsimile. *Ibid.*[3]

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[3] Throughout the investigation and resulting prosecution, federal agents and prosecutors received guidance and assistance from

The director general of DIGEPESCA responded to the agent's inquiry in three letters that described some of Honduras's laws regulating the lobster industry and confirmed that McNab's shipment had been illegally transported in violation of those laws. The director general provided authentic copies of the applicable laws and stated that the DIGEPESCA was ready to support all efforts by the government to prosecute persons who violate the Lacey Act. In early March 1999, NMFS agents seized the lobster shipment described in the anonymous facsimile based on the verifications by Honduran officials that the lobster shipment was illegal under Honduran law. Pet. App. 4a-5a.

Over the next few months, NMFS agents continued to communicate with Honduran officials about the Honduran laws and the legality of the seized lobster shipment. In June 1999, NMFS agents and an attorney in the United States National Oceanic and Atmospheric Administration (NOAA) met in Tegucigalpa, Honduras, with various Honduran officials from the SAG, including the minister, vice minister, director of legal services, director of legal affairs, secretary general, the director general of the DIGEPESCA, and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA), an agency within the SAG responsible for the enforcement of hygiene laws and regulations. Pet. App. 5a. During those meetings the Honduran officials confirmed that the lobsters had been exported illegally without first being inspected and processed, that there was a 5½ inch size limit for lobster tails, and that all catches had to be reported to

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the State Department and the United States Embassy in Honduras in determining which Honduran officials to contact in order to obtain authoritative advice about the contents of Honduran law.

Honduran authorities. The Honduran officials also provided certified copies of the laws in question. *Ibid.*

In September 1999, NMFS agents inspected the lobster shipment that had been seized earlier in the year from McNab's ship. Pet. App. 5a. The inspection confirmed that the seized lobsters were unprocessed and that a significant number had a tail length that was less than the 5½ inches required by the Honduran size limit restriction. In addition, many of the lobsters were egg-bearing or had their eggs removed. *Ibid.* In March 2000, two Honduran officials, a legal advisor in the Despacho Ministerial and a SAG legal advisor, traveled to Alabama to meet with prosecutors and investigators. Both legal advisors provided written statements reconfirming that Honduran law governing the lobster industry established size limits, prohibitions on taking egg-bearing lobsters, and processing and reporting requirements. *Id.* at 5a-6a.

Based upon NMFS's investigation and the verification of the applicable foreign laws by the Honduran officials charged with regulating the lobster fishing industry, the United States decided to prosecute petitioners for their roles in the illegal importing scheme. Pet. App. 6a. A federal grand jury ultimately returned a 47-count second superseding indictment based on the seized shipment and other shipments between 1996 and 1999. *Ibid.*; see *id.* at 114a-152a.

3. The district court conducted a pretrial hearing, in accordance with Rules 12(b) and 26.1 of the Federal Rules of Criminal Procedure, to assist in its determination of the relevant Honduran laws. Pet. App. 6a-7a; *id.* at 44a-65a. The SAG minister sent his secretary general, the SAG's highest-ranking legal official, to testify

at the hearing.[4] The secretary general testified about the validity of various laws and confirmed that the size limit, the prohibition against harvesting egg-bearing lobsters, and the processing and inspection requirement were in effect and legally binding during the time period covered by the indictment. Following the foreign law hearing, the district court ruled that the government met its burden of proving the Honduran laws that served as the predicates for the charges against petitioners. *Id.* at 6a-8a; see *id.* at 51-64a.

Following a jury trial, all four petitioners were convicted of conspiracy under 18 U.S.C. 371 for their part in the unlawful importation scheme. McNab, Blandford, and Schoenwetter were convicted of knowingly importing merchandise into the United States contrary to law in violation of 18 U.S.C. 545. Blandford was convicted of violating the Lacey Act, 16 U.S.C. 3371 *et seq.*, by: (1) dealing in fish and wildlife that he knew were unlawfully taken, possessed, transported, or sold, 16 U.S.C. 3372(a)(2)(A), 3373(d)(1)(B); and (2) dealing in fish and wildlife that he should have known were unlawfully taken, possessed, transported, or sold, 16

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[4] Petitioners characterize the secretary general as "a lower level functionary who had *no* legal authority to speak * * * on behalf of Honduras." 03-622 Pet. 17. The court of appeals determined, however, that the secretary general was the "highest-ranking legal official" in the Honduran agency responsible for regulation of the lobster fishing industry. Pet. App. 7a. The minister of that agency specifically sent the secretary general to testify at the district court's foreign law hearing on behalf of the Honduran government and later confirmed in an affidavit that she was authorized to "provide the necessary advice about and explanation of the enforcement and validity of Honduran laws." *Id.* at 8a, 22a n.25. See *id.* at 54a-55a (district court decision describing the secretary general—"[i]n contrast" to petitioners' witnesses—as "well-qualified" and "very credible").

U.S.C. 3372(a)(2)(A), 3373(d)(2). Huang was convicted of violating the Lacey Act by: (1) dealing in fish and wildlife that she should have known were unlawfully taken, possessed, transported, or sold, 16 U.S.C. 3372(a)(2)(A), 3373(d)(2); and (2) falsely labeling fish or wildlife, 16 U.S.C. 3372(d), 3373(d)(3)(A)(i). McNab and Blandford also were convicted of engaging in monetary transactions involving criminally derived property, 18 U.S.C. 1957, and of conspiring to engage in monetary transactions involving criminally derived property, 18 U.S.C. 1957, 1956(h). Pet. App. 79a-80a; 03-627 Pet. App. 169a-170a, 172a, 174a-175a. In total, McNab was found guilty on 28 counts, Blandford on 37 counts, Schoenwetter on 7 counts, and Huang on 17 counts. Pet. App. 8a.

4. After the verdicts, petitioners filed numerous motions to overturn their convictions. Among other things, the motions attacked, based on recent developments in Honduran law, the validity of the foreign laws underlying petitioners' convictions. In particular, the motions cited a May 2001 decision of a Honduran administrative law court, acting on a petition filed by McNab and opposed by the Honduran government. The administrative law court found that Resolution 030-95—which contained the 5½ inch size limit for spiny lobsters—had been promulgated through an incorrect procedure. Pet. App. 290a-301a. The Honduran judge ordered that the resolution was "entirely voided, but this is only for purposes of annulment and future inapplicability." *Id.* at 298a. The Honduran Appeals Court for Administrative Law later affirmed, through a summary order, the lower court judge's decision. *Id.* at 302a-305a.

To prepare for a hearing on petitioners' post-trial motions, an attorney from the Department of Justice and agents from NMFS and the FBI traveled to Hon-

duras in early August 2001 to discuss petitioners' challenges to the validity of the Honduran laws. See Pet. App. 8a. Three Honduran government officials, including the SAG secretary general, provided the United States with affidavits confirming the validity of the laws petitioners were challenging. *Ibid.* They also received an affidavit from the SAG minister stating that those Honduran government officials were authorized to provide advice on the enforcement and validity of the laws. *Ibid.* Following a hearing, the district court dismissed each of petitioners' post-trial motions. *Ibid.* The court sentenced McNab, Blandford, and Schoenwetter to 97 months of imprisonment and Huang to 24 months of imprisonment. *Id.* at 8a-9a.

Shortly thereafter, the Fiscal General Adjunto of Honduras, who directs the office that oversees criminal enforcement of Honduran laws, sent a letter to the United States Embassy in Honduras advising the embassy about various matters of Honduran law related to the decision of the Honduran Court of Administrative Law that Resolution 030-95 was promulgated through a technically improper procedure. See U.S. Add. to C.A. Br. (No. 01-15148-JJ) Tab 1. Among other things, the Fiscal General Adjunto stated that the Honduran court's decision on its face applied only prospectively, and that this was consistent both with Article 32 of the Law of Administrative Jurisdiction and with Article 96 of the Honduran Constitution. *Ibid.* He concluded that the court's decision "does not free [McNab] from the sanctions that would have resulted from a failure to observe the contested resolutions." *Ibid.*

5. After sentencing, petitioners appealed their convictions based, in part, on their contention that the Honduran laws used as the predicates for the Lacey Act convictions were invalid or void during the time

period covered by the indictment. With their appellate briefs, petitioners submitted several new documents, including the appellate court decision affirming the prospective invalidation of Resolution 030-95 (Pet. App. 302a-305a), an advisory report from the Honduran Human Rights Commissioner adopting certain allegations by McNab (*id.* at 306a-314a), and a statement from the minister of SAG concurring with McNab's allegations (*id.* at 315a-320a). At the same time, petitioners each filed a motion for new trial in the district court attaching the same documents. When the district court denied those motions, petitioners each filed an additional appeal. *Id.* at 9a n.12.

To assist in preparing the government's appellate brief in the first set of appeals, a Department of Justice attorney and NMFS agents again traveled to Honduras to discuss petitioners' new documents with Honduran officials. Pet. App. 9a. Once again, the Honduran officials confirmed their prior statements regarding the validity of the Honduran laws. *Ibid.* After briefing on petitioners' first set of appeals was complete and during briefing on petitioners' second set of appeals, the Embassy of Honduras and the Asociacion de Pescadores del Caribe, a Honduran trade association, filed a joint amicus curiae brief in support of McNab. *Id.* at 20a n.23 Although Honduran officials had assisted and supported the prosecution throughout the investigation and trial of this case, the Embassy and trade association's brief maintained that certain of the Honduran laws underlying petitioners' convictions were invalid at the time of the lobster shipments or had been repealed and that the United States had failed to consult with the proper Honduran officials and, instead, had intentionally sought out "midlevel employees who were not

authorized to render opinions on behalf of the Honduran government" (*id.* at 22a n.25).[5]

6. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-34a. Although petitioners raised and the court ruled on numerous issues, only two are relevant here. First, the court held that the Lacey Act's prohibition against importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce fish or wildlife taken, possessed, transported, or sold "in violation of any foreign law" includes foreign regulations and other legally binding requirements that have the force of law, and not just foreign statutes. *Id.* at 10a-18a. Second, the

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[5] Notwithstanding the Embassy's representations, the Honduran government apparently does not act in accordance with the Honduran administrative court's conclusion that Resolution 030-95 was issued through an incorrect procedure. The Honduran court cited two reasons for its conclusion: (1) that Resolution 030-95 was issued as a "Resolucion" rather than an "Acuerdo," the former being a form of law that is to be used only for resolving individual disputes and not to set forth general rules of conduct such as the size limit; and (2) Resolution 030-95 was not signed by the President. Pet. App. 290a-292a. But Honduras apparently continues to make widespread use of resolutions not signed by the President "to set requirements of general applicability" in regulating industry, and Honduras takes enforcement actions for violations of those requirements. U.S. Add. to C.A. Br. (No. 01-15148-JJ) Tab 2 (statement of Fiscal General Adjunto). For example, the Honduran Embassy recently submitted, as recently as August 2003, various resolutions, none of which were signed by the President, to the United States Department of State as evidence supporting its contention that Honduras should be certified pursuant to United States law as adequately regulating its shrimp fishery to prevent incidental taking of sea turtles. See Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609(b), 103 Stat. 1038.

court rejected petitioners' contentions that three of the five Honduran laws underlying their convictions were invalid during the period covered by the indictment. *Id.* at 18a-34a.

The court of appeals devoted the majority of its discussion to the validity of the Honduran laws. The court specifically examined the views expressed by the Honduran Embassy and a Honduran trade association, on the one hand, and the positions taken by Honduran officials throughout the investigation and prosecution of petitioners, on the other. The court of appeals stated that the unusual circumstances of the case required it to determine "whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position." Pet. App. 20a.

The court stated that, in determining questions of foreign law, "[a]mong the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country." Pet. App. 21a. Under normal circumstances, "[t]he court reasonably may assume that statements from foreign officials are a reliable and accurate source and may use such statements as a basis for its determination of the validity of foreign laws." *Id.* at 21a-22a. The court of appeals observed, however, that the circumstances of this case presented an unusual situation because Honduran officials had supported the validity of its laws and assisted the United States government throughout the investigation and prosecution, but then, after petitioners had been sentenced and the case was on appeal, Honduran officials had attempted to refute the original position of their country's representatives. *Id.* at 3a, 22a-23a. Accordingly, the court found, it was required to decide "a matter of first

impression": "whether our courts are bound by a foreign government's new representations regarding the validity of its laws when its new representations are issued only postconviction and directly contravene its original position upon which the government and our courts relied and the jury acted." *Id.* at 3a.

The court of appeals concluded that, where "a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position." Pet. App. 22a-23a. The court conducted its own analysis of the three Honduran laws that petitioners challenged, and it determined that those laws were valid during the period covered by the indictment. *Id.* at 24a-33a. The court also rejected the Honduran Embassy's and trade association's assertion in their amicus brief that the United States had not followed the proper channels in contacting Honduran officials about the validity of the Honduran laws at issue in the case. *Id.* at 22a n.25. The court found that "the record indicates quite the contrary" and that "it is clear that the government conducted its investigation properly through the Honduran officials who were responsible for interpreting, enforcing, and applying the fishing laws of Honduras." *Ibid.*[6]

ARGUMENT

Petitioners contend that the Lacey Act applies only to foreign laws, not foreign regulations, that the court of appeals failed to accord deference to a foreign sover-

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[6] Expressing "some hesitation," Judge Fay dissented "from that portion of the majority opinion upholding the validity of Honduran Resolution 030-95," which was one of the three Honduran laws at issue. Pet. App. 35a.

eign's interpretation of its own laws, and that the enforcement of Honduran law through the Lacey Act in this case violates due process. 03-622 Pet. 14-30; 03-627 Pet. 10-30. Those contentions lack merit. The court of appeals correctly concluded that the Lacey Act's reference to "any foreign law" includes both a foreign nation's statutes and its regulations. In evaluating the Honduran laws at issue here, the court gave due consideration to the Government of Honduras's position, as expressed by the Honduran Embassy, but the court ultimately and appropriately determined the substance of foreign law based on all the information before it. And there is no merit to petitioners' argument, which they raised for the first time on petition for rehearing, that the court's application of Honduran law would violate the Due Process Clause. Contrary to petitioners' contentions, the court of appeals' resolution of those issues does not conflict with any decision of this Court or another court of appeals, nor do those issues present any question otherwise warranting this Court's review.

1. Petitioners Blandford, Schoenwetter, and Huang argue (03-627 Pet. 28-30) that the Lacey Act's reference to "any foreign law" refers only to foreign statutes and does not include a foreign nation's administrative regulations and other legally binding provisions. The court of appeals, like every other court that has encountered the issue, correctly rejected that argument. See Pet. App. 10a-18a.

As this Court has recognized, the term "law" is commonly understood to include administrative regulations. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979) (holding that "authorized by law" in 18 U.S.C. 1905 includes administrative regulations); see also *United States* v. *Mitchell*, 39 F.3d 465, 468 (4th Cir.

1994) (holding that "contrary to law" in 18 U.S.C. 545 includes administrative regulations), cert. denied, 515 U.S. 1142 (1995). Consistent with that understanding, the lower courts have consistently interpreted the term "any foreign law" in the Lacey Act to include all forms of foreign law and not simply statutes. The Ninth Circuit has twice so held, rejecting precisely the arguments advanced here by petitioners. See *United States* v. *Lee*, 937 F.2d 1388, 1392 (1991) (holding that a violation of a foreign regulation constitutes a violation of "any foreign law" within meaning of the Lacey Act), cert. denied, 502 U.S. 1076 (1992); *United States* v. *594,464 Pounds of Salmon*, 871 F.2d 824, 830 (1989) (same). Other courts, without explicitly discussing the issue, routinely have applied the Lacey Act to violations of foreign laws that were not statutes.[7]

Petitioners suggest that the lower courts' uniform interpretation of the Lacey Act conflicts with this Court's decision in *United States* v. *Eaton*, 144 U.S. 677 (1892). *Eaton* involved a statute regulating manufacturers and dealers in oleomargarine that provided criminal penalties for knowing or willful failures "to do, or cause to be done, any of the things required by law." *Id.* at 684-685. The Court held that violation of an Internal Revenue Service regulation imposing record-

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[7] See, *e.g.*, *United States* v. *One Afghan Urial Ovis Orientalis Blandfordi Fully Mounted Sheep*, 964 F.2d 474, 477 (5th Cir. 1992) (importation into the United States of sheep exported from Pakistan in violation of Pakistani Export Trade Order); *United States* v. *Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 388-389 & n.6 (S.D. Fla. 1993) (lobsters taken in violation of Turks and Caicos Fisheries Protection Regulations); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988) (birds exported from Peru in violation of Peruvian Supreme Decree).

keeping requirements on margarine wholesalers did not trigger criminal penalties under that statutory provision. *Id.* at 687-688. This Court has repeatedly cautioned, however, that *Eaton* "turned on its special facts" and "has not been construed to state a fixed principle that a regulation can never be a 'law.'" *United States* v. *Howard*, 352 U.S. 212, 216 (1957); *Singer* v. *United States*, 323 U.S. 338, 345 (1945). Hence, there is no conflict between *Eaton* and the court of appeals' decision in this case.[8]

2. Petitioners argue (03-622 Pet. 15-28; 03-627 Pet. 10-20) that the court of appeals failed to give appropriate deference to the Honduran Embassy's representations respecting the application of Honduran law. Petitioners mischaracterize the court of appeals' decision, which accorded due consideration to the position expressed by the Honduran Embassy, but, on examination of the totality of circumstances, concluded that the embassy's position was not persuasive.

a. Rule 26.1 of the Federal Rules of Criminal Procedure provides that a federal court shall determine issues of foreign law as "questions of law" and authorizes the court to "consider any relevant material or source." Accord Fed. R. Civ. P. 44.1. Rules 26.1 and 44.1 make clear that the court has ultimate authority for resolving issues of foreign law, but it may consider the representations of foreign nations respecting application of their laws. The federal courts have developed the practice of granting substantial—but measured—

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[8] Indeed, *Howard* involved the Federal Black Bass Act, a predecessor of the Lacey Act that in relevant part prohibited transportation of fish across state lines contrary to "the law of the State" from which the fish was transported. 352 U.S. at 215-219. The Court held that "law of the State" included administrative rules and regulations. *Ibid.*

deference to a foreign nation's representations respecting its own laws. As the Second Circuit recently stated, "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002), cert. denied, 123 S. Ct. 2256 (2003).[9]

The court of appeals followed that approach in this case. It noted that statements from foreign officials are "logical sources for the court to look at in its determination of foreign law" and that courts "reasonably may assume that statements from foreign officials are a reliable and accurate source" in determining issues of foreign law. Pet. App. 21a-22a. But consistent with *Karaha Bodas*, the court refused to accept uncritically the Honduran Embassy's new representations, which differed dramatically from past Honduran representations. See *id.* at 22a-24a.

The court's decision is not only consistent with the approach articulated in *Karaha Bodas* and other cases, but it is also consistent with deference principles generally. As this Court has explained in the context of federal administrative law, "[t]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)

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[9] Accord *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (stating that "courts may defer to foreign government interpretations," but declining to do so under the circumstances of that case), cert. denied, 531 U.S. 917 (2000); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law.").

and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). But that deference is not unbounded:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the factors which give it power to persuade, if lacking power to control.

Id. at 228 (quoting *Skidmore*, 323 U.S. at 140). As petitioners concede, analogous principles apply here. 03-622 Pet. 23.[10]

Under those traditional deference principles, the court of appeals' refusal to accept uncritically the Honduran Embassy's new representations respecting Honduran law was appropriate. Those representations —which departed from past Honduran representations made directly both to United States officials through

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[10] Petitioners mistakenly cite *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as an example of deference principles. *Chevron* deals with the specific situation in which deference is appropriate because Congress has explicitly or implicitly delegated responsibility to a federal agency to make rules carrying the force of law. See *Mead*, 533 U.S. at 226-227. That case does not provide the appropriate analogy here because the Federal Rules of Criminal Procedure charge the federal courts with the responsibility to determine, de novo, the content of foreign law. See *Riggs Nat'l Corp.* v. *Commissioner*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (federal rules of procedure "direct[] U.S. courts to conduct a *de novo* review of foreign law"). *Skidmore* instead provides the appropriate analogy. Compare *Skidmore*, 323 U.S. at 140 (an agency's explanation has "power to persuade, if lacking power to control"), with *Karaha Bodas*, 313 F.3d at 92 ("a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference"); see also *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (interpretations in agency opinion letters receive *Skidmore* deference).

inter-governmental consultations concerning this specific prosecution and to a federal district court—did not reflect a consistently held view of Honduran law. See Pet. App. 5a-9a, 24a-33a; pp. 4-7, 8-10, *supra*. The court of appeals specifically determined that the Honduran Embassy's primary explanation for the change in position—that the previous position merely reflected the opinions of unauthorized low-level functionaries that had been solicited in a deliberate attempt to bypass official channels—was untrue. Pet. App. 22a n.25. Furthermore, the new representations lacked the "power to persuade" because they conflicted with the text of the laws, other pertinent Honduran legal authority, and the evidence of petitioner McNab's own expressed understanding of those laws. See *id.* at 24a-28a (Resolution 030-95), 29a-31a (Regulation 0008-93), 32a-33a (Article 70(3)).[11]

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[11] Judge Fay dissented only from the majority's analysis of Resolution 030-95, which imposed the size limit on lobsters. Pet. App. 35a. In his view, the Honduran government had not "changed its position" on the validity of that resolution and the Honduran court's asserted invalidation was controlling. See *ibid.* Judge Fay, however, was mistaken in his understanding of the record. During the district court's pretrial proceedings to determine foreign law, Honduran officials testified that the resolution was valid at the time of the offense. See *id.* at 24a n.26. McNab (who had recognized the validity of the resolution at the time of his unlawful takings, *ibid.*) later successfully sought to invalidate the resolution on procedural grounds. The Honduran court, however, invalidated the regulation "*only for purposes of [its] annulment and future inapplicability.*" *Id.* at 25a. Following that action, Honduran officials repeatedly confirmed that the invalidation, by its terms, would not have retroactive effect. See *id.* at 26a n.28, 27a n.29. That conclusion is consistent with other provisions of Honduran law. *Id.* at 27a n.30.

The court of appeals' decision rests on a proper understanding and articulation of deference principles. At bottom, petitioners simply challenge the court's application of those correctly stated principles to a situation —the determination of the scope of three particular Honduran fishing regulations—that is unlikely ever to recur. That issue does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

b. There is no merit to petitioners' claim that the court of appeals' decision conflicts with decisions of other courts of appeals. Petitioners rely on cases involving markedly different factual situations, and the differences in outcome are correspondingly unremarkable. As this Court has explained in the domestic law context, and the lower courts have consistently recognized in the foreign law context, the application of deference principles depends on a variety of factors and therefore inevitably leads to results that vary with the circumstances. See, *e.g.*, *Mead*, 533 U.S. at 228; *Karaha Bodas*, 313 F.3d at 92.[12]

Petitioners cite, for example, *Riggs National Corp.* v. *Commissioner*, 163 F.3d 1363 (D.C. Cir. 1999), as an example of a court's deference to a foreign govern-

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[12] Petitioners also argue (03-622 Pet. 15) that the court of appeals' decision is inconsistent with dicta from this Court's 1825 decision in *Emmendorf* v. *Talyor*, 23 U.S. (10 Wheat.) 152, 159-160 (1825), suggesting deference to the decisions of foreign courts respecting foreign law. This case, however, involves the question of deference to the views expressed below by the Honduran Embassy on behalf of the Republic of Honduras interpreting its laws and judicial decisions, and the *Emmendorf* dicta accordingly does not address the issue presented here.

ment's interpretation of foreign law. See 03-622 Pet. 15-17. That decision, however, which involved the act of state doctrine, is clearly distinguishable The issue before the court was whether Brazil had properly applied its tax laws to the Central Bank of Brazil. The court was "hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised." *Riggs Nat'l Corp.*, 163 F.3d at 1368. The court concluded, however, that Brazil's "order to the Central Bank to pay the taxes," which required the Central Bank to undertake government-compelled action in Brazil, "goes beyond a mere interpretation of law" and is therefore subject to the act of state doctrine. *Ibid.* In this instance, the court of appeals has no occasion to call into question any "act of state." See Pet. App. 23a ("Honduras has every right to invalidate and repeal the laws at issue in this case."). Rather, the court examined solely the Honduran government's inconsistent characterizations of its laws and judicial decisions. *Id.* at 24a-33a.

Petitioners also rely (03-622 Pet. 17-18) on *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir.), cert. dismissed, 506 U.S. 948 (1992), which held that a Chinese corporation was required to comply with the district court's discovery orders, even if doing so would violate Chinese secrecy laws. *Id.* at 1474-1479. In so holding, the court "accepted" the Chinese Government's position that the discovery orders would require the Chinese corporation to violate Chinese law. *Id.* at 1474. The court stated that such acceptance was required because it had "neither the power nor the expertise to determine for ourselves what [Chinese] law is." *Id.* at 1474 n.7. The court was plainly mistaken in

suggesting that federal courts lacked the "power" to determine the content of Chinese law. See Fed. R. Crim. P. 26.1; Fed. R. Civ. P. 44.1. Nevertheless, as the court of appeals in this case expressly recognized (Pet. App. 21a), the court was entitled to rely on the foreign government's representations in the absence of countervailing considerations. In any event, the court's discussion of the issue of Chinese law also was dicta. The resolution of that issue was unnecessary to its decision because the court found that the Chinese company had to comply with the district court's discovery order regardless of whether Chinese law prohibited such compliance. 959 F.2d at 1474-1479.

Petitioners next rely (03-622 Pet. 19-22) on *Karaha Bodas, Access Telecom, Inc.* v. *MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), cert. denied, 531 U.S. 917 (2000); and *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992), which all simply stand for the proposition that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas*, 313 F.3d at 92 (citing *Amoco Cadiz*, 954 F.2d at 1312, and *Access Telecom*, 197 F.3d at 714). Each of those cases involves the application of the same deference principles that the court of appeals applied here to different factual situations.

In *Karaha Bodas*, the Second Circuit concluded, after conducting its own analysis of an issue of Indonesian law, that the Indonesian government's representations provided additional support for the court's conclusion. 313 F.3d at 90-92. In *Access Telecom*, the Fifth Circuit noted that "courts may defer to foreign government interpretations [of their laws]," but did not follow an interpretation of Mexican law stated in an Official Circular of the Mexican Secretary of Communications

and Transportation because, among other reasons, it was not clear that the Secretary was authorized to interpret Mexican law and the most relevant Official Circular addressed a more recent enactment than the one at issue in that case. 197 F.3d at 714. In *Amoco Cadiz*, the Seventh Circuit gave "substantial deference" to the French Government's interpretation of its laws, where France's interpretation reflected its long-standing consistent position on the issue presented. 954 F.3d at 1312. In none of those cases did the court of appeals encounter the specific situation present here, where the foreign representatives' statements were inconsistent with the text of the relevant legal authorities and other official representations made to United States officials and a lower court. See Pet. App. 24a-33a.[13]

Indeed, petitioners cite (03-627 Pet. 14) only one decision that remotely resembles the situation presented in this case, *Jota* v. *Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998), and that decision supports the outcome here. In

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[13] The other decisions that petitioners cite are likewise distinguishable. In *Kaho* v. *Ilchert*, 765 F.2d 877 (9th Cir. 1985), the Crown Solicitor of Tongo initially wrote a letter to the U.S. Library of Congress expressing his view on an issue of Tongan law, and then six months later sent a letter clarifying his view. *Id.* at 883. Both letters predated not only the case, but also the filing of the immigration petition that gave rise to the litigation. The court of appeals did not simply defer to the Tongan Government's position but instead resolved the issue of Tongan law based on its own detailed analysis of the materials in the record. *Id.* at 884-885. In *United States* v. *Pillsbury Flour Mills Co.*, 96 F.2d 854 (C.C.P.A. 1938), the Court of Customs and Patent Appeals held that it should defer to the Cuban Government's interpretation of a Cuban tax law, where it was uncontested that the interpretation had consistently been followed in Cuba and never challenged in Cuban courts. *Id.* at 858-859.

that instance, the Second Circuit declined to defer to the Republic of Ecuador's changed view of its own law while a matter was on appeal. The court of appeals stated that it was permissible to "hold[] a nation to the litigating position it asserted prior to the entry of judgment." *Id.* at 160. Although the court also noted the countervailing "desirability of having the courts of one nation accord deference to the official position of a foreign state," it recognized that "consideration of a nation's altered litigating stance cannot justify an altered outcome that would unduly prejudice a party that had acted in reliance on a judgment entered in light of the nation's original position or would result in a significant waste of judicial resources by renewing litigation fully tried." *Ibid.*[14]

Petitioners are also mistaken in contending (03-622 Pet. 27-28) that the issue presented here—whether a federal court may disagree with a foreign embassy's representations respecting foreign laws, when those representations differ from the text of the relevant legal authorities and from authoritative representations provided earlier by foreign officials to the United States and to a lower court—will occur with any frequency. The court of appeals in this case described the matter as one of "first impression in this Circuit and apparently the other circuits as well," Pet. App. 3a, while the court of appeals in *Jota* described the situation as one that is "rarely encountered," 157 F.3d at 160. While foreign law may regularly be implicated in

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[14] The court ultimately determined that, because the district court had erred in its rulings, "[t]his case does not require us to determine whether, or in what circumstances, we might remand a case, pending on direct review, solely because of a sovereign nation's altered litigating position." 157 F.3d at 161.

domestic litigation, the degree of deference will inevitably vary with the circumstances. This Court's review is unlikely to provide significant guidance beyond the Court's prior observation in the domestic law context that courts must "tailor deference to variety." *Mead*, 533 U.S. at 236.

3. Petitioners mistakenly contend (03-622 Pet. 28-30; 03-627 Pet. 20-21)) that their convictions are invalid because they are entitled to the benefit of any favorable changes in Honduran law. To the extent that petitioners rely on the Honduran Embassy's new representations concerning Honduran law, however, those materials constitute interpretations of Honduran law. They do not constitute a change in the laws themselves.[15]

Some actual changes in Honduran law—as opposed to mere changes in opinion about Honduran law—did occur during the course of the proceedings below. In December 1999, Honduras repealed Regulation 0008-93, which contained the inspection and processing requirements, and replaced it with updated but substantially similar inspection and processing requirements. Pet. App. 29a. In 2001, a Honduran court declared Resolu-

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[15] The question whether petitioners could have been convicted of a criminal offense in Honduras is, of course, irrelevant to the validity of their convictions in the United States, because the Lacey Act's criminal enforcement provisions apply regardless of whether a defendant could face criminal enforcement action for the underlying violation of a law regarding fish or wildlife. See *United States* v. *Lee*, 937 F.2d 1388 (9th Cir. 1991) (affirming Lacey Act conviction for violations of Taiwanese administrative regulation that carry no criminal sanction in Taiwan); *United States* v. *Cameron*, 888 F.2d 1279, 1282 (9th Cir. 1989) (affirming Lacey Act conviction for violations of federal Halibut Act that would not be a criminal violation under the Halibut Act).

tion 030-95, the size limit regulation, prospectively invalid. *Id.* at 25a. Also in 2001, the Honduran Congress amended Article 70(3) of the Fishing Law, which contains the prohibition against harvesting or destroying lobster eggs. *Id.* at 33a. As the court of appeals explained, however, the inquiry mandated by the Lacey Act is the legality of the conduct under Honduran law at the time it occurred, rather than whether such conduct is now legal:

> If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act by importing the lobsters in violation of those laws. Whatever changes in the laws occurred after the lobsters were imported into the United States illegally have no effect on the defendants' convictions.

Id. at 19a-20a; see *id.* at 27a-28a ("The fact that Honduras now may not hold the defendants liable for past shipments that contained undersized lobsters does not change the fact that those shipments violated then-valid Honduran laws and the Lacey Act."). Because, as the court of appeals found, none of these changes in Honduran law had retroactive effect under Honduran law, they did not retroactively legalize petitioners' lobster shipments.[16]

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[16] The court of appeals specifically examined Article 96 of the Honduran Constitution, which provides that changes in the law do not have a retroactive effect, the only exception being that a "new law" applies retroactively in penal matters. Pet. App. 28a n.30, 415a. The court of appeals reasoned that the Honduran court's declaration of the prospective invalidity of Resolution 030-95 was not a "new law" and that the exception for penal matters therefore did not apply. *Id.* at 27a n.30. The exception for "new law" in penal matters also would not apply because no Honduran "penal

Petitioners mistakenly suggest (03-622 Pet. 29; 03-627 Pet. 21) that United States law mandates that changes in Honduran law must operate retroactively to petitioners' benefit. The questions whether the lobster shipments violated Honduran law and whether subsequent developments in Honduran law retroactively legalized the shipments are questions of Honduran law. The Due Process Clause of the Fifth Amendment to the United States Constitution does not require that Honduras apply its invalidation of Honduran law retroactively. Cf. *Bunkley* v. *Florida*, 123 S. Ct. 2020 (2003) (per curiam) (accepting the Florida Supreme Court's characterization of its state law determination for purposes of due process analysis); *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001) (per curiam) (accepting Pennsylvania's characterization of its state law determinations for purposes of due process analysis).

The court of appeals correctly focused, therefore, on whether, under Honduran law, the relevant requirements were in effect during the period covered by the indictment. The court of appeals' determination that Honduras did not retroactively invalidate the regulations at issue presents a case-specific, non-recurring question that does not merit this Court's review.

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matters" or criminal proceedings were involved in this case, which was a prosecution in a United States court for federal criminal offenses. See *ibid.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.